

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On October 29, 2014 appellant, then a 68-year-old retired aircraft sheet-metal apprentice, filed an occupational disease claim (Form CA-2) alleging that she was exposed to and worked with various toxins and chemicals while in the performance of duty. She claimed that her work-related toxin/chemical exposure resulted in numerous medical conditions, including breast cancer, abdominal dumping, and thyroid problems. Appellant first became aware of her medical conditions and that they had been caused or aggravated by her federal employment on April 21, 1994. She submitted factual and medical evidence in support of her claim.

By development letter dated April 7, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she provide additional factual and medical evidence and complete a questionnaire. The questionnaire asked appellant to address when she first became aware that the alleged exposure to toxic chemicals caused her alleged conditions. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted statements dated February 6 and May 18, 2012. She noted that she worked from August 6, 1984 until October 20, 1987, when her career ended due to a work-related back injury. Appellant listed the various chemicals she claimed she was exposed to, including but not limited to, methyl ethyl ketone, Tetrachloroethylene, asbestos, Soltrol-130, Soltrol-220, jet fuels JP-4 and JP-5, PCPS, radiation, and Agent Orange. As a result of her exposure, she alleged that she developed fibromyalgia, right breast cancer, stomach problems including the removal of part of her intestine in 2007, Sjogren's disease, acid reflux, rheumatoid arthritis, bladder and bowel dysfunction, sexual dysfunction, arachnoiditis syndrome, thyroiditis, migraine headaches, recurrent dental problems, and difficulty swallowing. Appellant noted that her research indicated that the radiation and Agent Orange stored at the employing establishment was still active and that her physician, Dr. James W. Simmons, a Board-certified orthopedic specialist, had opined that there could be an association or causal relationship from those chemicals and her illnesses.

Appellant also submitted various documents including an April 21, 1994 medical report from James C. Garriott, Ph.D., a toxicologist, a June 2, 2003 article from the Wall Street Journal, a February 11, 2012 case management review from Alamo Bone and Joint Clinic, and an October 1, 2013 letter from the Environmental Law and Litigation Division of the Department of the Air Force.

By decision dated July 23, 2015, OWCP denied appellant's occupational disease claim finding that it was untimely filed. It found that she had not filed her claim within the three-year time period of the alleged injury as required under FECA and that the evidence of record did not establish that appellant's immediate supervisor had actual knowledge within 30 days of April 21, 1994, the date of injury.

On September 4, 2015 OWCP reissued the July 23, 2015 decision due to a change of appellant's address.

On October 2, 2015 appellant requested a telephonic hearing before an OWCP hearing representative.

On May 23, 2016 a telephonic hearing was held. Appellant explained that she had not filed her claim earlier because she did not think that she had a case until she talked to a lawyer, who told her to refile her claim. The hearing representative noted that appellant had filed an earlier occupational disease claim (Form CA-2) on July 1, 1994 for chemical exposure, as set forth in OWCP File No. xxxxx101, and that claim had been denied. Appellant indicated that she believed that she had established the timeliness requirement and that her chemical exposure (specifically Agent Orange) caused or worsened her cancer, breast cancer, stomach problems, and thyroid conditions. After the hearing, OWCP received additional factual and medical evidence.

By decision dated July 26, 2016, an OWCP hearing representative affirmed the September 4, 2015 decision that her claim was untimely filed.<sup>3</sup> He found that appellant's claim had not been filed within the three years filing requirement of the date of last exposure or from the perspective of "latent" disability, noting that the similarity of the current claim to appellant's prior claim in OWCP File No. xxxxx101 provided further evidence that appellant was aware of her illness in 1994. The hearing representative also found that there was no evidence to support exceptional circumstances to allow for a waiver of the timely filing requirement.

On November 28, 2016 appellant requested reconsideration. She noted that she could not provide additional evidence until she found a medical toxicologist.

By decision dated February 9, 2017, OWCP denied appellant's request for reconsideration finding that her November 22, 2016 statement submitted on reconsideration neither raised substantive legal questions nor included new and relevant evidence.<sup>4</sup>

On October 4, 2017 OWCP received appellant's August 21, 2017 letter requesting reconsideration. Appellant related that her claim was filed untimely because she had numerous illnesses since her original work-related injury and she had required time for recuperation and rehabilitation, and her mental illness exacerbated her inability to focus. She also noted that the employing establishment had closed and therefore she could not provide notice of injury to a supervisor. Additional evidence was received including magazine articles and medical reports.

By decision dated July 12, 2018, OWCP denied appellant's August 21, 2017 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>3</sup> The hearing representative noted that appellant last worked in August 1987 and that she had identified April 21, 1994 as the date she first became aware of her illness and realized that it was caused or worsened by her federal employment.

<sup>4</sup> On November 9, 2018 the Board issued an order dismissing appellant's appeal as her application for review of OWCP's February 9, 2017 decision was untimely filed. Docket No. 18-1401 (issued November 9, 2018).

## **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>5</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).<sup>7</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>8</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>9</sup> If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>10</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>11</sup>

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>12</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>8</sup> *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>9</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>10</sup> *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 7 at Chapter 2.1602.5 (February 2016).

<sup>11</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>12</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

In the last merit decision of appellant's case, dated July 26, 2016, OWCP denied her occupational disease claim because she had not filed her claim within the three-year limitation period provided in 5 U.S.C. § 8122. As it received appellant's request for reconsideration on October 4, 2017, more than one year after the July 26, 2016 merit decision, the Board finds that OWCP properly determined that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying her claim for compensation.<sup>14</sup>

In support of her request for reconsideration, appellant submitted an August 21, 2017 letter in which she asserted that her claim was untimely filed because she had numerous illnesses since an initial work-related injury from which she needed to recuperate and that her mental illness had exacerbated her inability to focus. While section 8122(d)(3) of FECA provides that the time limitations for filing a claim do not run against an individual whose failure to comply is excused by the Secretary when such notice could not be given because of exceptional circumstances,<sup>15</sup> appellant had not established by the time the last merit decision was issued in this case, July 26, 2016, that the exceptions relating to inability to file a claim applied in this case. Appellant had not established that she was incompetent during the three years following the date of the alleged injury, such that an exceptional circumstance excused her failure to timely file a claim.<sup>16</sup>

The term clear evidence of error is intended to represent a difficult standard.<sup>17</sup> It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.<sup>18</sup> In her untimely request for reconsideration, appellant also noted that the employing establishment had closed by the time she associated several of her diagnosed conditions to her work. This vague argument, however, does not raise a substantial question as to the correctness of OWCP's July 26, 2016 merit decision. The magazine articles and medical evidence submitted by appellant with her August 21, 2017

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<sup>13</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>14</sup> *See L.W.*, Docket No. 17-1630 (issued June 7, 2018); *see also D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>15</sup> 5 U.S.C. § 8122(d)(3).

<sup>16</sup> *See R.T.*, Docket No. 18-1590 (issued February 15, 2019).

<sup>17</sup> *See L.H.*, Docket No. 18-1277 (issued February 22, 2019).

<sup>18</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

reconsideration request also did not establish that she had filed a timely occupational disease claim or that the employing establishment had timely notice of her injury.<sup>19</sup>

As the evidence submitted does not raise a substantial question concerning the correctness of OWCP's July 26, 2016 merit decision, appellant has failed to demonstrate clear evidence of error.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>19</sup> See *L.W.*, *supra* note 14.